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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOVEREIGN NEWS COMPANY,

Petitioner,

—v—

JOHN T. CORRIGAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Are Ohio's criminal obscenity statutes, Ohio Revised Code §§ 2907.01 and 2907.32, as construed by the Ohio Supreme Court, unconstitutional under the First and Fourteenth Amendments due to overbreadth or vagueness?

PARTIES

John T. Corrigan, Prosecuting Attorney for Cuyahoga County, Ohio and the following members of the Cleveland, Ohio Police Department are respondents in this Court and were parties in the United States Court of Appeals for the Sixth Circuit, whose judgment is sought to be reviewed: Roy Warner, L. Thompson, John Crawford, Archie Catavalos, Kenneth White, William Poe, Richard B. Millett, John H. Devine, James Lynsky, Vincent G. Krawulski, Carl Delau, Andrew S. Vanyo, James Kennelley, Robert J. Cermak, Henry Yisha, Gregory Kunz, B. Jones, Richard McIntosh, John McNamara, Edward C. Lucas, Samuel Hennie, Charles Berkey, Robert O'Brien, Officer Kaminsky, Officer Banyon and Officer McGreer. In addition, William J. Brown, Attorney General of Ohio appeared as amicus curiae in the court below. Lee C. Falke, Prosecuting Attorney for Montgomery County, Ohio and Dayton, Ohio police officers E. R. Robinson and C.L. Dalrymple were parties defendant in the district court but were not parties to the appeal in the court below which resulted in the judgment now sought to be reviewed.

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SOVEREIGN NEWS COMPANY,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Sovereign News Company, petitioner, prays that a writ of certiorari issue to review the judgment entered in this action by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The second opinion of the United States Court of Appeals for the Sixth Circuit in this case, reported at 674 F. 2d 484 (6th Cir. 1982) is set forth in the Appendix at pp. A1-A5. The second opinion of the district court in this case, unreported, is set forth in the Appendix at pp. A6-A90. The first opinion of the United States Court of Appeals for the Sixth Circuit in this case, reported at 610 F. 2d 428 (6th Cir. 1979), is set forth in the Appendix at pp. A93-A96. The first opinion of the district court in this case is reported at 448 F. Supp. 306 (N.D. Ohio

1977). The opinion and judgment of the Sixth Circuit in *Turoso, et al. v. Cleveland Municipal Court, et al.*, reported at 674 F. 2d 486 (6th Cir. 1982), entered the same day as the second opinion of the Sixth Circuit in this case and deciding the same issue in six consolidated habeas corpus cases, is set forth in the Appendix at pp. A107-A129. The six opinions of the district courts in the habeas corpus cases reviewed by the Sixth Circuit in its consolidated decision in *Turoso, et al. v. Cleveland Municipal Court, et al., supra,* five of which are unreported and one of which is reported at 531 F. Supp. 829 (N.D. Ohio 1980), are set forth in the Appendix at pp. A130-212. The opinion of the Ohio Supreme Court in *State v. Burgun,* 56 Ohio St. 2d 354 (1978), referred to in both opinions rendered by the Sixth Circuit in this case is set forth in the Appendix at pp. A213-A245.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were filed on February 4, 1982. The Court of Appeals denied the petitioner's application for rehearing on March 23, 1982. This petition seeks review of the judgment of a United States Court of Appeals in a civil case. This Court has jurisdiction to grant this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States are set forth in the Appendix at pp. A247-A250. Title 28, Section 1331 of the United States Code is set forth in the Appendix at pp. A251-A252. Title 28, Sections 1343 and 2201 of the United States Code and Title 42 Section 1983 of the United States Code, as those statutes were worded at the time of the filing of the complaint in this case, are set forth in the Appendix at pp. A253-A256. Ohio Revised Code Sections 2907.01 and 2907.32 are set forth in the Appendix at pp. A257-A265.

STATEMENT OF THE CASE

This petition seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit which decided an important issue upon which there has been sharp disagreement among the various federal district and Circuit Judges who have considered it. Specifically, the court of appeals in this case determined that Ohio's criminal obscenity statutes, Ohio Revised Code §§ 2907.01 and 2907.32, are neither unconstitutionally overbroad nor vague. The court of appeals, therefore, reversed the contrary finding of the district court and vacated the judgment of the district court declaring Ohio's criminal obscenity laws unconstitutional and preliminarily enjoining the respondents from enforcing those laws against the petitioner.

The case began when Sovereign News Co., the petitioner, filed an action in the United States District Court for the Northern District of Ohio for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 1331 and 1343 on March 7, 1977, three weeks after some thirty law enforcement officers from two different counties in Ohio conducted a massive search of the petitioner's business premises in Cleveland, Ohio, for evidence that could be used to prosecute the petitioner under the state's criminal obscenity laws. Named as defendants were two police officers of the City of Dayton, County of Montgomery, Ohio; the Montgomery County prosecutor; twenty-six police officers of the City of Cleveland, County of Cuyahoga, Ohio; and the Cuyahoga County prosecutor.[1]

The petitioner moved for a preliminary injunction restraining the named defendants from enforcing the Ohio criminal

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1 The respondents in this Court are the Cuyahoga County law enforcement authorities who were named as defendants—the Cuyahoga County prosecutor and twenty-six Cleveland police officers. The Montgomery County law enforcement authorities who were named as defendants in the complaint are not respondents in this Court, as the petitioner's claims for declaratory and injunctive relief against them were dismissed by the district court and that action of the district court was not before the court of appeals for review when it rendered the judgment which the petitioner now asks this Court to review.

obscenity statute against it. An evidentiary hearing on that motion in the district court began on March 29, 1977 and was completed on March 31, 1977. The hearing on the motion for a preliminary injunction was consolidated with the final hearing on the petitioner's claim for a declaratory judgment finding Ohio's criminal obscenity law unconstitutional, a claim which presented solely a legal issue (App. A102-A106).

At hearing, the evidence showed that on February 16, 1977 at 10:30 a.m., approximately thirty law enforcement officers (two of whom were Dayton policemen and the rest of whom were Cleveland policemen) besieged the office and warehouse building of Sovereign News Co. in the City of Cleveland, where they spent the next four hours rummaging throughout the premises and seizing a wide variety of business records and other items (Tr. 65, 218, 60-61, 84-85).

The search was conducted pursuant to a warrant which had been issued by a judge of the Common Pleas Court of Cuyahoga County at the request of the Dayton policemen, who were investigating Sovereign's business transactions with twelve bookstores in Dayton (Tr. 180, 204-205). The warrant authorized a search of Sovereign News Co. for thirteen allegedly obscene magazines which Sovereign allegedly had supplied to the twelve Dayton bookstores as well as business records evidencing Sovereign's relationship with those Dayton bookstores. Notwithstanding the warrant's limitation, the record reveals and the district court found that the searching officers transgressed far beyond the authority contained in the writ for the specific purpose of furthering an ongoing Cleveland investigation of Sovereign, an investigation that had been undertaken with a view toward prosecuting Sovereign in Cleveland under Ohio's criminal obscenity laws. *Sovereign I, supra,* at 448 F. Supp. 321-325.

Cleveland police officers testified that at the time of the raid, Sovereign and its employees were the subject of a current and ongoing investigation by the Cleveland police; that the Cleveland police department had conducted surveillance at Sovereign's building; that Sovereign's employees had been followed; that contacts had been made with other law enforcement agencies to obtain information about Sovereign and its

employees; and that the investigation was being conducted with a view toward prosecuting Sovereign under Ohio's criminal obscenity law (Tr. 90-92, 216-217, 223-224).

An assistant county prosecutor for Montgomery County testified that his office was also conducting an investigation of Sovereign and its employees to determine whether an indictment should be returned in Montgomery County against them for pandering obscenity and engaging in organized crime (Tr. 246-247).

On May 3, 1977, nearly two months after the suit had been filed and more than one month after the conclusion of the hearing in the district court, a two-count indictment was returned by the Montgomery County Grand Jury charging Sovereign with violation of Ohio Revised Code Section 2907.32, pandering obscenity, and Ohio Revised Code Section 2923.04(A)(5), engaging in organized crime. The district court took judicial notice of the post-hearing existence of the indictment, pursuant to Federal Rules of Evidence 201 and 902(4). *Sovereign I, supra,* at 448 F. Supp. 315.

Additionally, the parties stipulated that a prosecution was pending against Sovereign in Hamilton County, Ohio, on indictments returned in 1976 for pandering obscenity and engaging in organized crime (Tr. 273-274).

But, even though prosecution of Sovereign News in Cuyahoga County, Ohio, had been threatened, no prosecution of Sovereign in that jurisdiction was pending when suit was filed, when the hearing on petitioner's motion for a preliminary injunction was concluded, or when the district court entered its original order in this case on October 31, 1977.

On the basis of the foregoing set of facts, the district court refused to hear the petitioner's claims for declaratory and injunctive relief against the Montgomery County authorities and, instead, dismissed those claims on the basis of *Younger v. Harris,* 401 U.S. 37 (1971) and its progeny. *Sovereign I, supra,* at 448 F. Supp. 328-372.

But because *no* prosecution was pending against the petitioner in Cuyahoga County, Ohio, the district court did not

abstain from deciding the claims for declaratory and injunctive relief asserted by the petitioner against the Cuyahoga County law enforcement authorities. *Sovereign I, supra,* at 448 F. Supp. 390-408. Rather, the district court reached the merits of those claims, declared Ohio's obscenity law unconstitutional and entered a preliminary injunction, but only against the Cuyahoga County prosecutor and the Cleveland police officer defendants and restraining them only from enforcing that law against the petitioner, its owners or its employees. *Sovereign I, supra,* at 448 F. Supp. 390-408.

While cross-appeals from the district court's decision were pending in the United States Court of Appeals for the Sixth Circuit,[2] the Ohio Supreme Court decided the case of *State v. Burgun,* 56 Ohio St. 2d 354 (1978) (App. A213-244). In that case, the Ohio Supreme Court upheld the constitutionality of Ohio's criminal obscenity law. Because of that intervening state court decision, the Sixth Circuit Court of Appeals, without reaching the merits of the appeals before it, issued an order on December 7, 1979 remanding the present case to the district court for further consideration in the light of the action by the Ohio Supreme Court (App. A93).

The Cleveland police officers then filed a petition with this Court for a writ of certiorari to review the decision of the Sixth Circuit Court of Appeals remanding the case to the district court. This Court denied the petition for a writ of certiorari on June 16, 1980 (App. A92).

The case was then before the district court a second time. The district court carefully reconsidered its judgment in light of the decision of the Ohio Supreme Court in *State v. Burgun, supra.* On September 19, 1980, the district court, in an extensive opinion, declared Ohio's obscenity law as construed by the Ohio Supreme Court to be unconstitutionally vague and overbroad (App. A6-A90).

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2 The Cuyahoga County officials appealed from the declaratory judgment and preliminary injunction entered against them. The petitioner appealed from the district court's order dismissing its claims for declaratory and injunctive relief against the Montgomery County officials.

From that decision, the Cleveland police officers and the Cuyahoga County prosecutor, who are respondents in this Court, appealed to the Sixth Circuit Court of Appeals.[3] On February 4, 1982, the Court of Appeals issued a *per curiam* order in which it held that Ohio's criminal obscenity law as interpreted by the Ohio Supreme Court is not unconstitutionally overbroad or vague. Circuit Judge Engel wrote a concurring opinion, in which he apologetically noted that the "majority [had] disposed of by order an issue which has generated at least three lengthy analyses by the district courts and has seen four judges of the United States District Court for the Northern District of Ohio evenly divided on the constitutionality of the Ohio statute," and in which he remarked that "[b]ecause the issue is more complex than the order would imply, I believe it is necessary to provide a more reasoned analysis, given the importance which has been attached to the issue by the Supreme Court of Ohio and by the United States district judges who have been obliged to deal with it." (App. A4).

Judge Engel was also the author of the far more extensive majority opinion in another case decided the very same day as this one adjudicating the very same issues raised about the constitutionality of Ohio's criminal obscenity law. *Frank Turoso, et al. v. The Cleveland Municipal Court, et al.*, 674 F. 2d 486 (6th Cir. 1982), petition for cert filed on June 9, 1982, Case No. 81-2266 (App. A107-A129). That decision was rendered in six consolidated appeals from conflicting decisions rendered by various federal district judges sitting in the United States District Court for the Northern District of Ohio in habeas corpus proceedings instituted by persons who had been convicted and sentenced under Ohio's obscenity statutes.

The district judges who decided those habeas cases had been divided on the question of the constitutionality of the Ohio obscenity statute. District Judge John M. Manos, who presided over the instant case, granted habeas relief in three cases pending before him for the reasons expressed in his second

3 Petitioner did not renew its appeal from the district court's order dismissing the claims against the Montgomery County officials.

opinion in the present case (App. A177-A182, A183-A188, A189-A194). District Judge Ann Aldrich also granted habeas relief in the case pending before her on the ground that the Ohio obscenity law as construed by the Ohio Supreme Court is unconstitutionally vague and overbroad (App. A209-A212). District Judge William K. Thomas and Chief Judge Frank J. Battisti upheld the constitutionality of the Ohio obscenity statute and, therefore, denied habeas relief in the cases before them (App. A130-A176, A195-A208).

Separate appeals were taken from each of those judgments, but the appeals were consolidated for decision by the Sixth Circuit Court of Appeals. Over the vigorous dissent of Circiut Judge Merritt, the majority in the consolidated habeas cases found that the constitutionality of Ohio's obscenity statute had been saved by the judicial gloss placed upon it by the Ohio Supreme Court in *State v. Burgun, supra.* A petition for a writ of certiorari to review the judgment of the Court of Appeals in that case was filed on June 9, 1982 and is presently pending before this Court in case number 81-2266.

The present petition, which raises the identical issues, seeks review of the *per curiam* order entered by the Sixth Circuit Court of Appeals in this case on the same day.

REASONS FOR GRANTING THE WRIT

AN IMPORTANT QUESTION, UPON WHICH THERE IS SHARP DISAGREEMENT AMONG THE FEDERAL DISTRICT AND CIRCUIT JUDGES WHO HAVE CONSIDERED IT, IS PRESENTED AS TO WHETHER OHIO'S CRIMINAL OBSCENITY STATUTES, AS CONSTRUED BY THE OHIO SUPREME COURT, ARE UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS DUE TO OVERBREADTH OR VAGUENESS.

There can be little doubt that the questions squarely raised by this petition for a writ of certiorari are important and substantial: whether or not Ohio makes it a crime, under its obscenity statute as construed by the Ohio Supreme Court in

State v. Burgun, 56 Ohio St. 2d 354 (1978), to publish literature which is protected by the First Amendment and whether or not Ohio has given clear and specific notice of what ideas its citizens may express without fear of criminal prosecution under that statute.

Two federal district judges and a Circuit Judge who carefully considered these issues all were left with the firm and clear conviction, persuasively expressed in written opinions, that Ohio's obscenity law as construed by the Ohio Supreme Court in *Burgun* is flagrantly unconstitutional under the First and Fourteenth Amendments due to overbreadth and vagueness. Those federal district and Circuit Judges who arrived at the contrary conclusion that Ohio's obscenity law as construed by the Ohio Supreme Court is valid, nevertheless, implicitly acknowledged that the constitutional attacks waged against the statute were by no means insubstantial.

Thus, the court below in the present case stated that it "recognizes that there is language in the Ohio Statute which is in arguable conflict with . . . *Miller v. California*" (App. A2-A3). And the majority in the habeas cases decided the same day acknowledged that the habeas petitioners' ". . . claims have superficial appeal" (App. A116); conceded that, ". . . taken alone, certain of the disjunctive definitions of 'obscene' in section 2907.01(F) may appear to apply only to protected activity, such as simply nudity and violence" (App. A119); and agreed " . . . with the dissent that the language in [another Ohio Supreme Court decision] is disturbing. . . ." (App. A124).

In this posture, with the issues so sharply debated by federal district and Circuit Judges alike, but with all of these Judges in agreement that the issues are, indeed, substantial, the question of the constitutionality of Ohio's obscenity law should be heard and settled by this Court. For it is not too much to suggest that what hangs in the balance is freedom of expression in the State of Ohio.

In order to place the issues raised by this case in their proper perspective, it is important first to review the constitutional defects of Ohio's criminal obscenity law as written and then to

consider whether the Ohio Supreme Court's decision in *Burgun* remedied those defects.

A. The Overbreadth And Vagueness Of Ohio's Criminal Obscenity Law As Written.

In its landmark decision in *Miller v. California*, 413 U.S. 15 (1973), this Court defined the limitations imposed by the First and Fourteenth Amendments upon the power of the states to proscribe obscenity. This Court held:

> [W]e confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value.
>
> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24 (footnote and citations omitted).
>
> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law as written or construed. *Id.* at 27.

On January 1, 1974, subsequent to this Court's decision in *Miller*, Ohio Revised Code §§ 2907.32 and 2907.01, the statutes

challenged here, became law. Section 2907.32 of the Ohio Revised Code makes it a crime to disseminate obscene materials while Section 2907.01 of the Ohio Revised Code defines obscenity. That statutory definition, in relevant part, is as follows:

> Definitions. As used in sections 2907.01 to 2907.37 of the Revised Code:
>
> (A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.
>
> (B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.
>
> (C) "Sexual activity" means sexual conduct or sexual contact, or both.
>
> * * * * *
>
> (F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:
>
> (1) Its dominant appeal is to prurient interest;
>
> (2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;
>
> (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
>
> (4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human

bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

The first occasion on which a federal court measured this definition of obscenity against the standards enunciated in *Miller* occurred in this case when the district court issued the first of two decisions declaring Ohio Revised Code §§ 2907.01 and 2907.32 unconstitutional. In the course of a scholarly and extensive opinion, District Judge John M. Manos found those statutes to be unconstitutional due to their substantial overbreadth and vagueness and upon a determination that they were not readily susceptible to an authoritative construction by the state courts that would cure their constitutional infirmities. On the question of overbreadth, the district court held in its first opinion at 448 F. Supp. 400:

The court finds that in four separate instances § 2907.01 defines "obscenity" in a manner that restricts constitutionally protected expression.

First: Section 2907.01(F)(1), (2), (3), (4) and (5) fail to incorporate the three-part *Miller* test. The *Miller* test is a conjunctive three part test, *all* parts of which must be satisfied before the material may be found obscene . . . However, under Ohio Revised Code § 2907.01 material may be found obscene without the state being required to prove each of the three parts of *Miller.* An example of this is § 2907.01(F)(1) which defines as "obscene", material whose " . . . dominant appeal is to prurient interest." Under Subsection (F)(1), the *Miller* requirements that (b) the material be "patently offensive" and (c) that "taken as a whole, it lacks serious literary, artistic, political or scientific value," need not be proven by the state before material can be found obscene. It is evident, therefore, that material which is not patently offensive, and which has, for example serious literary value, may, under Ohio Revised Code § 2907.01(F)(1), be found obscene. The Court concludes that Ohio R.C. § 2907.01 restricts material which is not "obscene", making the statute overbroad.

Second: Section 2907.01(F)(3) unconstitutionally restricts the display or depiction of extreme or bizarre violence, cruelty or brutality. It is an express holding of *Miller* that only material depicting or describing sexual conduct may be barred as being obscene. *See, Miller v. California, supra,* 413 U.S. at 24, 93 S.Ct. 2607. Therefore, the restrictions placed on the description or depiction of extreme violence unconstitutionally restrains free expression, and the statute is therefore overbroad.

Third: Section 2907.01(F)(1)(2)(3) and (5) unconstitutionally restrict the display and description of non-active sexual conduct. For example, simple nudity,

> such as the showing of a female breast or a male buttocks, may be considered obscene under § 2907.01 (F). A sexual depiction of that kind is not hard-core pornography, and cannot be restricted as being obscene . . . Therefore the court finds § 2907.01 (F)(1)(2)(3) and (5) are overbroad in that they restrict non-hardcore sexual conduct.
>
> *Fourth:* Section 2907.01(F)(1) does not define with the requisite specificity the sexual acts the description or depiction of which is restricted. Subsection (F)(1) declares that any material whose "dominant appeal is to prurient interest" is obscene. The subsection is unconstitutionally overbroad because it does not list the types of sexual conduct to be restricted, and therefore may be applied to the depiction of sexual conduct not subject to restriction. (Footnotes omitted).

In the same decision, the district court also found Ohio Revised Code Section 2907.01 to be unconstitutionally vague because of its failure to satisfy *Miller's* requirement that a state obscenity law specifically define the sexual conduct whose depiction or description is proscribed. The most glaring example of the statute's impermissible vagueness is found in subsection (1) of Ohio Revised Code § 2907.01(F). That subsection defines as obscene any material whose ". . . dominant appeal is to prurient interest." The subsection completely fails to define or list the sexual depictions included within its terms, contrary to *Miller's* express requirement.

There is little disagreement with the district court's conclusion in its first opinion in this case that, as written, Ohio Revised Code § 2907.01 is unconstitutionally overbroad and vague. Even those federal district and Circuit Judges who concluded that the statute, as interpreted by the Ohio Supreme Court, is constitutional acknowledged the unconstitutionality of that law as written (App. A2-A3, A159-A162, A200, A119).

The question upon which there has been sharp disagreement, however, is whether or not the Ohio Supreme Court saved the

constitutionality of the statute by its decision in *Burgun*. The petitioner respectfully submits that that is a question worthy of review by this Court.

B. The Overbreadth And Vagueness Of Ohio's Criminal Obscenity Law As Interpreted By The Ohio Supreme Court.

In *State v. Burgun*, 56 Ohio St. 2d 354 (1978), the Ohio Supreme Court was presented with its first challenge to the constitutionality of Ohio Revised Code § 2907.01. While it conceded that the statute's definition of obscenity as written could not survive a constitutional attack, it nevertheless determined that it could uphold the statute by merely adding to the statutory language, by judicial construction, the three-pronged *Miller* test. The court stated its holding as follows:

> We hold that R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read *in pari materia* with the *Miller* decision. The *Miller* test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court construction specifically sanctioned by *Miller.*
>
> *In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited.* Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit.
>
> *In three of the four appeals before this court the trial court adhered to the foregoing interpretation of Ohio obscenity law. In each instance the jury was instructed initially under the Ohio statute and then given a "narrowing" instruction restricting the definition of obscenity to the test laid down in Miller.* In light of that interpretation and application of R.C. 2907.01(F) this proposition of law is not well-taken and hereby overruled, except in *State v. Burgun*, case No. 77-1144, where the failure to instruct on *Miller*

was reversible error. *State v. Burgun, supra,* at 56 Ohio St. 2d 361-362 (Emphasis added).

It is apparent from its opinion and its holding that the Ohio Supreme court did not alter or tamper with the language of Ohio Revised Code § 2907.01 itself; rather, what the court did was *add* to it. District Judge Manos analyzed the effect of this judicial addition to the statutory definition of obscenity in his second opinion in this case:

> In *Burgun,* the Ohio Supreme Court left the language of Revised Code § 2907.01 intact. Instead, it attempted to remedy the statute by merely tacking onto it the three-pronged *Miller* formula, the second prong of which requires either the state legislature or the state courts to define with specificity what kinds of sexual depictions may be found obscene. The Ohio Supreme Court declined to specify what kinds of sexual depictions may be found obscene, however, and left the language of Revised Code § 2907.01 completely intact to serve that purpose. The result is that the Ohio Supreme Court created a circular definition of obscenity which always leads to and depends upon the language employed in Revised Code § 2907.01 itself.
>
> The second part of the *Miller* test of obscenity, which has been added to Revised Code § 2907.01 by the *Burgun* decision, reads as follows:
>
> > "(b) whether the work depicts or describes in a patently offensive way sexual conduct *specifically defined by the applicable state law; . . . .*" *Miller, supra,* at 413 U.S. 24 (Emphasis added).
>
> It is clear from this language that the *Miller* formula is not a self-sufficient definition of obscenity. On the contrary, *Miller's* second prong can be implemented only by legislation, or judicial interpretation of legis-

lation, which specifically prescribed what types of sexual depictions or descriptions may be obscene. When, as is true of Revised Code § 2907.01, the law as written lacks the requisite precision and censors expression which is constitutionally protected, *Miller* requires an authoritative construction which affirmatively supplies the missing specificity and which limits the law's reach to a ban on designated hard-core pornography.

In the *Burgun* decision, however, the Supreme Court of Ohio declined to list what kinds of sexual depictions may be found obscene under Revised Code § 2907.01. Instead, the court found that the statutory language alone and without judicial interpretation is narrow and specific enough to comply with *Miller's* second prong. The court expressly stated that Revised Code § 2907.01 is " . . . extremely precise in defining what conduct is prohibited." *Burgun, supra,* at 56 Ohio St. 361. Accordingly, in adding the *Miller* formula to Revised Code § 2907.01, the Supreme Court of Ohio did not alter in any fashion the law's recital of the *kinds* of descriptions or depictions which may be found obscene in Ohio. (App. A36-A38).

The court below, both in its decision in this case and in the majority opinion in the habeas cases, appeared to recognize that Ohio's obscenity law could not be saved by the mere addition of *Miller's* guidelines without a specific recitation of the kinds of sexual conduct whose depiction is to be banned under the law, as required by the second *Miller* guideline. But the court below concluded that the Ohio Supreme Court had added the requisite specificity in *Burgun* by implication. Specifically, the court below determined that the Ohio Supreme Court, in adding the three-pronged *Miller* test to the statute, had impliedly incorporated into the statute as well the examples given by this Court in *Miller* of what could be regulated

under the second prong of the *Miller* test.[4] Thus, the court concluded, the Ohio law could be upheld. Although it was not cited in the *per curiam* order entered by the court below in this case, the more extensive opinion of the majority in the habeas cases decided the same day relied upon this Court's decision in *Ward v. Illinois*, 431 U.S. 767 (1977) in support of its conclusion.

In *Ward*, this Court sustained the constitutionality of Illinois' criminal obscenity statute which, unlike Ohio's law, was phrased in simple but general language upon which it was easy to place a limiting judicial gloss that could be harmonized with the actual wording of the statute.[5] This Court upheld the Illinois statute because it had been given an authoritative construction by the state's highest court which not only incorporated into it the *Miller* guidelines, but also incorporated into it the explanatory examples given in *Miller* of the kinds of sexual depictions which can validly be regulated under the second prong of the *Miller* guidelines.

In the present case, the court below concluded that Ohio's law could also be upheld on the theory that, although it did not do so expressly, the Ohio Supreme Court in *Burgun* incorpo-

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4 In *Miller*, this Court had stated:

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra:*

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller, supra*, 413 U.S. at 25 (footnotes omitted).

5 The Illinois statute defined obscenity as follows:

"A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

rated *Miller's* explanatory examples into Ohio's statute by implication. In reaching this conclusion, the court ignored the overwhelming evidence to the contrary found by District Judge Manos in his second opinion in this case. At pp. 16-19 of his opinion, District Judge Manos recounted the convincing evidence showing that the Ohio Supreme Court had not adopted *Miller's* explanatory examples:

> *First,* unlike the Illinois Supreme Court, the Ohio Supreme Court has affirmed findings of obscenity in cases clearly not involving the kind of sexual depictions given as examples in *Miller. State ex rel. Keating v. Vixen,* 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973), is a particularly apt example, because that case is cited with approval by the Ohio Supreme Court in *Burgun.* The decision in *Vixen* was the second one that had been rendered by the Ohio Supreme Court in that case. The first time that court considered the case, it found that the film 'Vixen' was obscene under Revised Code § 2905.34, the predecessor to Revised Code § 2907.01, and affirmed an injunction against the film's exhibition. *State ex rel. Keating v. Vixen,* 27 Ohio St. 2d 278 (1971). That decision was appealed to the United States Supreme Court, which vacated the judgment and remanded the case for further consideration in light of *Miller* and its companion cases. *A Motion Picture Film Entitled 'Vixen' v. Ohio,* 413 U.S. 905 (1973).
>
> On remand, the Ohio Supreme Court found that definition of obscenity then in force in Ohio comported, on its face, with *Miller* and that the film 'Vixen' was, indeed, obscene. *State ex rel. Keating v. 'Vixen',* 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).
>
> The film found by the Ohio Supreme Court to be obscene, even after *Miller* was decided and considered, was described by the Ohio Supreme Court in its earlier opinion as follows:

> "The principal character, Vixen, is a buxom young wife, whose 'square' husband is a combination pilot and fishing guide in the wilderness of British Columbia. His work keeps him away from their home for extended periods of time. Among the other characters are Vixen's motorcycle hood brother, a Canadian Mountie, with whom Vixen passes the first few minutes of the film, a vacationing couple who are guest-clients of the husband, a black American whom Vixen despises and who has fled the country to avoid the draft, and an Irish communist who attempts at gun-point to force Vixen's husband to fly him to Cuba. The first four are objects of Vixen's lechery.
>
> "The movie is approximately 70 minutes long, out of which approximately one-half deals with incest, adultery, and lesbianism, which are graphically portrayed through facial and bodily expressions indicative of orgasmic reaction. The remaining one-half of the movie leads the viewer through such contemporary issues as racism, anti-militarism, communism and airplane hijacking. ***It should be noted that, although the players are frequently shown nude and at full length, at no place are their genital parts exposed to the leering lens of the camera.***"

(Emphasis added; 272 N.E.2d at 139). The court further noted, at 272 N.E.2d 140:

> "Assume, hypothetically that the main character in 'The Sound of Music' performs during one scene, an act of sexual lewdness, could we permit that part of the

> film to go unregulated merely because the producer had an 'eye on the recent Supreme Court rulings?' The question supplies its own answer.
>
> "Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse."

(Footnotes omitted).

As described by the Ohio Supreme Court, the film "Vixen" clearly is not the kind of hardcore pornography which *Miller* permits the states to censor. Indeed, based on the description given by the Ohio Supreme Court, "Vixen" is less explicit than the film found to be protected by the First Amendment in *Jenkins v. Georgia,* 418 U.S. 161 (1974).

Similarly, the Ohio Supreme Court's suggestion that "The Sound of Music" could be rendered obscene by the inclusion of a single act of sexual lewdness in one scene completely ignores what has been basic constitutional law since the 1957 decision of the Supreme Court in *Roth v. United States,* 354 U.S. 476 (1957)—that, in judging whether a work is obscene, it must be considered as a whole and in its entirety.

Thus, unlike the decisions rendered by the Illinois Supreme Court summarized in *Ward,* the decisions of the Ohio Supreme Court have not applied the state's obscenity statute only to works which depict the kinds of hardcore sexual conduct given as examples in *Miller.* For this reason, initially, this court concludes that in *Burgun,* which cited the *Vixen* decision with approval, the Ohio Supreme Court did not intend to adopt the *Miller* examples or to narrow

the Ohio obscenity statute to the kinds of sexual depictions set forth in those examples.

Second, unlike Illinois' obscenity law, Ohio's law does not lend itself to an interpretation which incorporates *Miller*'s explanatory examples. While subsection (F)(1) of Revised Code § 2907.01, which defines as obscene any material whose "dominant appeal is to prurient interest," is open-ended, subsections (F)(2), (3), (4) and (5) are not. Those latter subsections define obscenity in detailed terms which substantially exceed and cannot be reconciled with the *Miller* examples. Revised Code § 2907.01, unlike Illinois' open-ended law, simply is not susceptible to an interpretation incorporating in it the *Miller* examples. This fact, along with the Ohio Supreme Court's statement in *Burgun* that it believes Revised Code § 2907.01 to be " . . . extremely precise in defining what conduct is prohibited," *Id.* at 56 Ohio St. 2d 361, leads to the inevitable conclusion that the court in *Burgun* did not adopt the *Miller* examples.

Third, the Ohio Supreme Court, in *Burgun,* quoted a passage from *Miller* which contained the three-pronged *Miller* test but which *excluded* the portion of the *Miller* decision which set forth examples of what a state could validly regulate under the second prong of the *Miller* test. By way of contrast, one of the Illinois Supreme Court decisions upon which the court in *Ward* relied to uphold Illinois' statute quoted the passage from *Miller* which included the explanatory examples. The court, in *Ward,* found this fact to be very significant and concluded from it that the Illinois Supreme Court had incorporated *Miller's* explanatory examples into the state's obscenity law.

Fourth, the jury instructions given in the three cases in which convictions were affirmed by the Ohio Supreme Court in *Burgun* are most revealing. The

affirmance of those convictions was expressly based upon the fact that the jury instructions given by the trial court in those cases conformed to the interpretation given to Revised Code § 2907.01 by the Ohio Supreme Court in *Burgun*. The Ohio Supreme Court specifically held that those instructions represented correct recitals of the definition of obscenity under Ohio law, *as construed in Burgun*. In each of those three cases, the trial court read Revised Code § 2907.01(F) to the jury. It then read to the jury the three-pronged *Miller* test *without any reference to Miller's explanatory examples*. Thus, in each of those three cases the trial court's instructions to the jury on the second prong of the *Miller* formula was substantially as follows:

> " . . . Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." (From p. 532 of the trial transcript in *State v. Krute*, one of the cases affirmed in *Burgun*, supra.)

Given the fact that the Ohio Supreme Court affirmed the convictions in those three cases on the express ground that the jury instructions given by the trial courts correctly stated the definition of obscenity under Revised Code § 2907.01, as construed in *Burgun*, the conclusion is inescapable that the Ohio Supreme Court did not incorporate into Ohio's obscenity law *Miller's* explanatory examples. (App. A47-A55).

In his concurring opinion in the court below, Judge Engel expressed his own uncertainty that the Ohio Supreme Court had actually adopted the *Miller* examples as part of Ohio's obscenity law. He, therefore, advanced a second, alternative basis for the conclusion that the *Burgun* decision spared Ohio Revised Code § 2907.01 from constitutional demise. And writing for the majority in the habeas cases, Judge Engel advanced

the same alternative basis for upholding the statute, perhaps betraying the uneasiness that the majority there had with the conclusion that the Ohio Supreme Court had adopted the *Miller* examples, particularly in the face of such convincing evidence to the contrary detailed in the district court's second opinion in this case.

Judge Engel, concurring in this case, and writing for the majority in the habeas cases, observed that the second guideline in *Miller* is "whether the work depicts in a patently offensive way, *sexual conduct* specifically defined by the applicable state law." *Miller, supra,* at 413 U.S. 24 (Emphasis added). He then noted that the term "sexual conduct," found in *Miller's* second prong, is also a term which is specifically defined by paragraph (A) of Ohio Revised Code § 2907.01 and that the definition given there is consistent with the *Miller* examples. Since the Ohio Supreme Court adopted the three *Miller* guidelines, including the second one which uses the term "sexual conduct," and since the term "sexual conduct" is defined by paragraph (A) of Ohio Revised Code § 2907.01, Judge Engel reasoned, the Ohio Supreme Court saved the constitutionality of the state statute by limiting the reach of the statute as a whole to only those depictions falling within the definition of "sexual conduct" set forth in paragraph (A) of R.C. § 2907.01.

The problem with this analysis is that the Ohio Supreme Court did not do, nor did it intend to do, that which Judge Engel attributed to it. Furthermore, as Judge Engel himself wrote for the majority in the habeas cases, "[i]t is unreasonable to consider only discrete sections of the statute in order to determine its validity" (App. A116-A117). Yet, petitioner respectfully submits, that is precisely what Judge Engel did by focusing so narrowly upon the definition of "sexual conduct" contained in paragraph (A) of Ohio Revised Code § 2907.01 without a proper regard to the context in which that term is defined and its relationship to the entire statutory scheme defining obscenity.

The primary source of the definition of obscenity in Ohio is paragraph (F) of R.C. § 2907.01. That section, set forth

verbatim at pp. 11-12, above, provides, in distinct subparts, five separate and disjunctive definitions of obscenity. Some of the words used in the five subparts of subsection (F) are themselves defined in other subsections of Ohio Revised Code § 2907.01. For example, nudity is defined in subsection (H), sexual excitement in subsection (G) and sexual activity in subsection (C). But these subsections are relevant to the question of obscenity *only* because the words defined by them are found in subsection (F) of the statute, where the term obscenity is itself defined. Thus, these subsections do not serve primary roles in the definition of obscenity, but rather serve subsidiary and secondary functions in that they further define terms used in the primary definition of obscenity set forth in subsection (F).[6]

The definition of sexual conduct found in subsection (A) of R.C. § 2907.01 is even one step further removed from the definition of obscenity in Ohio. That term is not even used in the definition of obscenity set forth in subsection (F) of R.C. § 2907.01. It is relevant to the definition of obscenity only because, as set forth in subsection (C) of R.C. § 2907.01, the definition of sexual activity, which *is* used in the definition of obscenity, includes but is not limited to sexual conduct.

Given this statutory structure, in which the term sexual conduct plays such a minor role, it is hard to believe that the Ohio Supreme Court in *Burgun* intended, without saying so, to turn it upside down by making the definition of sexual conduct paramount and the detailed definition of obscenity subservient. In fact, it is clear that that is not what the court did. The syllabus itself in *Burgun* expressly states that it was "R.C. § 2907.01 *(F)*" that was being "authoritatively construed to incorporate the guidelines prescribed in *Miller* . . . . " Moreover, the opinion of the Ohio Supreme Court in *Burgun* is dominated by a discussion of the definition of obscenity

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6 Some of these subsections also serve the function of defining words used in other statutes contained in Chapter 2907 of the Revised Code and which define offenses other than those involving the dissemination of obscene material.

contained in subsection (F) of R.C. § 2907.01. The definition of sexual conduct under subsection (A) of R.C. § 2907.01 is never even mentioned or cited anywhere in the court's opinion in *Burgun*.

It is clear that when the Ohio Supreme Court in *Burgun* incorporated that part of the *Miller* test which requires a work to depict " . . . sexual conduct specifically defined by the applicable state law" the court did not thereby limit or intend to limit the reach of Ohio's obscenity law to only those depictions included within the definition of sexual conduct set forth in subsection (A) of Ohio Revised Code § 2907.01. Rather, the court left subsection (F) of Ohio Revised Code § 2907.01 intact and on the books to serve as the applicable state law specifically defining the sexual conduct which may be found obscene in Ohio.

And, petitioner submits, that is precisely why the statute remains unconstitutionally overbroad and vague even after *Burgun*. The statute still censors depictions of nudity, defined so broadly as to include the showing of any portion of a female breast "below the top of the nipple" and the showing of a male or female buttock with "less than a full opaque covering." *See* Ohio Revised Code § 2907.01(H). The statute still defines as obscene the depiction of "sexual activity" which, as defined includes "sexual contact," which in turn includes a depiction of a man touching a woman's thigh. *See* Ohio Revised Code §§ 2907.01(B) and (C). The statute still outlaws depictions of extreme or bizarre violence, cruelty and brutality. Ohio Revised Code §§ 2907.01(F)(3) and (5). And the statute still censors expression whose "dominant appeal is to prurient interest," without specifying the kinds of sexual conduct the description or depiction of which is prohibited by that phraseology. As Judge Merrit stated in his dissenting opinion in the habeas cases:

> . . . all the Supreme Court of Ohio has done is simply add the *Miller* standards as a new, alternative method of sending people to prison while leaving in effect alongside it the old unconstitutional method

> outlawing graphic expression of "sexual excitement", "nudity", "bizarre violence" and "human bodily functions." (App. A128).

Both the *per curiam* decision rendered by the court below in this case and the decision rendered by the majority in the habeas cases on the same day proceed upon an erroneous premise. Because the Ohio Supreme Court held in *Burgun* that Ohio Revised Code § 2907.01 must be read in *pari materia* with *Miller*, the court below assumed that, without striking down or excising any of its language, the statute *can* be read in *pari materia* with *Miller*. But the Ohio Supreme Court never offered any guidance as to precisely how that could be accomplished. That court never explained how to get the square peg of Ohio Revised Code § 2907.01 to fit into the round hole of *Miller*, without cutting off its four corners. That court simply announced that it would fit. But the laws of physics are not amenable to change by judicial decree.

The court below itself admitted that ". . . there is language in the Ohio Statute which is in arguable conflict with . . . *Miller*" (App. A2-A3). It is respectfully submitted that the conflict between the statute and *Miller* is not merely arguable but is actually irreconcilable. So long as there remains, as part of the statute, language which defines as obscene the depiction of semi-nudity, violence, the mere touching of another's thigh and the like, it will be impossible to read the statute *in pari materia* with *Miller*.

The two decisions rendered by the court below in this case and in the habeas cases, while upholding one state's criminal obscenity law, will have a far-reaching effect on the law of obscenity throughout the nation. For the court below has expanded *Ward* in a way never intended by this Court. It has taken a statute whose actual language is at war with *Miller* and upheld it, not, as *Ward* permits, *because* the state's highest court had by judicial construction affirmatively removed or limited those actual words of the statute which render it facially overbroad and vague, but rather, *despite* the refusal of the state's highest court to do so. In the name of *Ward*, it has taken a statute whose language directly conflicts with *Miller*

and, in sustaining it, has required nothing more than the bare assertion by the state's highest court that the statutory language can peacefully co-exist side by side with the *Miller* test without any reconciliation of the conflicts between the two.

These important decisions by a federal court of appeals has breathed new life into the very kinds of broadbased statutes outlawing speech *Miller* was fashioned to eradicate and *Ward* did not intend to revive. It represents an open invitation to state legislatures to enact criminal obscenity laws which broadly stifle protected expression and holds out the promise to them that these laws will withstand constitutional attack so long as the *Miller* guidelines are inserted as a footnote to the statutory language by judicial construction.

In short, the decision below makes hollow this Court's promise in *Miller* that:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. *Id.* at 413 U.S. 27.

As Judge Merritt stated so cogently in his dissenting opinion in the habeas cases:

> . . . this is a statute outlawing speech and artistic expression; it requires a more sensitive reading of the First Amendment than our Court has given. Unlike the relatively healthy state statute saved in *Ward v. Illinois* by insertion of a *Miller* pacemaker, the heart of the Ohio statute in question here is malignant. A *Miller* pacemaker will not regulate it. If our Court's opinion stands as the law of obscenity, then all state obscenity statutes will be upheld as valid, no matter how broadly or specifically they censor protected speech, so long as the *Miller* standards are repeated to the jurors after they are instructed to apply the unconstitutional statute. (App. A125).

This Court should grant the petition for a writ of certiorari to consider the important issues presented by this case.

CONCLUSION

For the reasons stated, the petitioner respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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